

E-filing

FILED
MAR 31 2:58
U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY**Name MICHEL AleJandro F
(Last) (First) (Initial)Prisoner Number T-86169Institutional Address CSP-SACRAMENTO/B2-227P.O. BOX 29-0066 Represa, CA 95671**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**AleJandro F MICHEL
(Enter the full name of plaintiff in this action.)

vs.

J. WALKER warden

(Enter the full name of respondent(s) or jailor in this action)

Case No. 08 1724
(To be provided by the clerk of court)**PETITION FOR A WRIT
OF HABEAS CORPUS****(PR)**Read Comments Carefully Before Filling InWhen and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

PET. FOR WRIT OF HAB. CORPUS

- 1 -

1 Who to Name as Respondent

2 You must name the person in whose actual custody you are. This usually means the Warden or
 3 jailor. Do not name the State of California, a city, a county or the superior court of the county in which
 4 you are imprisoned or by whom you were convicted and sentenced. These are not proper
 5 respondents.

6 If you are not presently in custody pursuant to the state judgment against which you seek relief
 7 but may be subject to such custody in the future (e.g., detainees), you must name the person in whose
 8 custody you are now and the Attorney General of the state in which the judgment you seek to attack
 9 was entered.

10 A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

11 1. What sentence are you challenging in this petition?

12 (a) Name and location of court that imposed sentence (for example; Alameda
 13 County Superior Court, Oakland):

14 MARIN COUNTY SUPERIOR COURT SAN RAFAEL
 15 Court Location

16 (b) Case number, if known 123016

17 (c) Date and terms of sentence MARCH 20, 2003 / 12 YRS 4 MONTH

18 (d) Are you now in custody serving this term? (Custody means being in jail, on
 19 parole or probation, etc.) Yes ☒ No ☐

20 Where?

21 Name of Institution: CSP-SACRAMENTO (NEW FOLSOM)

22 Address: P.O. BOX 290066 REPRESA CA 95671

23 2. For what crime were you given this sentence? (If your petition challenges a sentence for
 24 more than one crime, list each crime separately using Penal Code numbers if known. If you are
 25 challenging more than one sentence, you should file a different petition for each sentence.)

26 SIX COUNTS OF 2ND DEGREE ROBBERY P.C. § 211

27 TWO COUNTS OF ATTEMPTED ROBBERY P.C. § 664

28 ONE COUNT OF GUN ENHANCEMENT P.C. § 12022

3. Did you have any of the following?

Arraignment: Yes ☒ No ☐

Preliminary Hearing: Yes ☒ No ☐

Motion to Suppress: Yes ☐ No ☒

4. How did you plead?

Guilty ☒ Not Guilty ☐ Nolo Contendere ☐

Any other plea (specify) Change of Plea Form

5. If you went to trial, what kind of trial did you have?

Jury ☐ Judge alone ☐ Judge alone on a transcript ☐

6. Did you testify at your trial? Yes ☐ No ☐

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes ☒ No ☐

(b) Preliminary hearing Yes ☒ No ☐

(c) Time of plea Yes ☒ No ☐

(d) Trial Yes ☐ No ☒

(e) Sentencing Yes ☒ No ☐

(f) Appeal Yes ☒ No ☐

(g) Other post-conviction proceeding Yes ☐ No ☒

8. Did you appeal your conviction? Yes ☐ No ☒

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes ☐ No ☐

Year: _____ Result: _____

Supreme Court of California Yes ☐ No ☐

Year: _____ Result: _____

Any other court Yes ☐ No ☐

Year: _____ Result: _____

(b) If you appealed, were the grounds the same as those that you are raising in this

1 petition? Yes _____ No XXXX

2 (c) Was there an opinion? Yes _____ No _____

3 (d) Did you seek permission to file a late appeal under Rule 31(a)?

4 Yes _____ No _____

5 If you did, give the name of the court and the result:

6 _____
7 _____

8 9. Other than appeals, have you previously filed any petitions, applications or motions with respect to
9 this conviction in any court, state or federal? Yes X No XXXX

10 [Note: If you previously filed a petition for a writ of habeas corpus in federal court that
11 challenged the same conviction you are challenging now and if that petition was denied or dismissed
12 with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit
13 for an order authorizing the district court to consider this petition. You may not file a second or
14 subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28
15 U.S.C. §§ 2244(b).]

16 (a) If you sought relief in any proceeding other than an appeal, answer the following
17 questions for each proceeding. Attach extra paper if you need more space.

18 I. Name of Court: MARIN COUNTY SUPERIOR COURT

19 Type of Proceeding: HABEAS CORPUS PETITION

20 Grounds raised (Be brief but specific):

21 a. APPENDIX B - Bickely - CUNNINGHAM VIOLATIONS

22 b. CALIFORNIA'S DETERMINATE SENTENCING LAW (DSL) VIOLATION

23 c. _____

24 d. _____

25 Result: denied (order attached hereto as exn A) Date of Result: APRIL 25, 2007

26 II. Name of Court: CALIFORNIA COURT OF APPEAL; FIRST APPELLANT DISTRICT, DIV. 5.

27 Type of Proceeding: HABEAS CORPUS PETITION

28 Grounds raised (Be brief but specific):

a. (Same AS HEREIN) and same as SUPERIOR COURT

b. _____

c. _____

d. _____

Result: denied (see ATTACHED EXH 'B' hereto) Date of Result: July 13, 2007

III. Name of Court: SUPREME COURT OF CALIFORNIA

Type of Proceeding: HABEAS CORPUS petition

Grounds raised (Be brief but specific):

a. (Same as HEREIN) and same as SUPERIOR and Appellant court above.

b. _____

c. _____

d. _____

Result: denied (see attached EXH 'C' hereto) Date of Result: JAN 30, 2008

IV. Name of Court: _____

Type of Proceeding: _____

Grounds raised (Be brief but specific):

a. _____

b. _____

c. _____

d. _____

Result: _____ Date of Result: _____

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes _____ No ☒

Name and location of court: _____

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to

support each claim. For example, what legal right or privilege were you denied? What happened?

Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

PET. FOR WRIT OF HAB. CORPUS

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1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: DUE TO SCOPE OF ISSUES PLEASE SEE ATTACHED MEMORANDUM
6 OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS
7 Supporting Facts: (SAME AS ABOVE)

8
9
10
11 Claim Two: DUE TO SCOPE OF ISSUES PLEASE SEE ATTACHED MEMORANDUM OF
12 POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS
13 Supporting Facts: (SAME AS ABOVE)

14
15
16
17 Claim Three:
18
19 Supporting Facts:

20
21
22
23 If any of these grounds was not previously presented to any other court, state briefly which
24 grounds were not presented and why:

25
26
27
28

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

APPENDI V. NEW JERSEY, 530 U.S. 466 (2000)/BLAKELY V. WASHINGTON
542 U.S. 296 (2004)/CUNNINGHAM V. CALIFORNIA (2007) 549 U.S. 127 S.Ct.
8567/PEOPLE V. BANKS, (APR. 13, 2007) 6036873 — CAL. APP. 4TH — (2007 WL1111849)

Do you have an attorney for this petition?

Yes _____ No ✓

If you do, give the name and address of your attorney:

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on March 25, 2008

Date

Clerk Michael

Signature of Petitioner

(Rev. 6/02)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I.

THE TRIAL COURTS IMPOSITION OF THE UPPER TERM OF IMPRISONMENT ON ALL SIX COUNTS OF 2ND. DEGREE ROBBERY AND ON BOTH COUNTS OF ATTEMPTED ROBBERY, BASED ON FACTS NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT, NOW ADMITTED BY PETITIONER TO BE TRUE, VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION UNDER APPENDI V. NEW JERSEY, 530 U.S. 446 (2000); BLAKELY V. WASHINGTON, 542 U.S. 296 (2004); CUNNINGHAM V. CALIFORNIA, AND PEOPLE V. BANKS, (APR. 13, 2007) 6036873, CAL. APP. 4TH. (2007 WL 1111849).

STATEMENT OF FACTS

ON JANUARY 6, 2003 AN INFORMATION WAS FILED IN THE MARIN COUNTY SUPERIOR COURT CHARGING PETITIONER WITH SIX COUNTS OF 2ND. DEGREE ROBBERY IN VIOLATION OF CALIFORNIA PENAL CODE SECTION ¹. 211 (COUNTS 4-9) AND TWO COUNTS OF ATTEMPTED ROBBERY IN VIOLATION OF P.C. §§ 211 & 664 (CLERK'S TRANSCRIPTS ². AT PAGES 144-147).

THE INFORMATION FURTHER ALLEGED THAT PETITIONER WAS ARMED WITH A FIREARM IN COUNT 6, IN VIOLATION OF P.C. § 12022 (a)(1) (CT. 145).

ON JANUARY 6, 2003 PETITIONER

HEADNOTE: 1. HEREIN AFTER: P.C. §.
 2. HEREIN AFTER: CT.

1 PLEAD GUILTY TO ALL SIX COUNTS OF 2ND. DEGREE ROBBERY AND BOTH
2 COUNTS OF A TEMPTED ROBBERY (CT. 134). PETITIONER ALSO ADMITTED
3 THE SPECIAL ALLEGATION TO BE TRUE (CT. 134).

4 ON MARCH 19, 2003 THE COURT SENTENCED
5 PETITIONER TO THE UPPER TERM OF 5-YEARS ON COUNT SIX AND
6 CONSECUTIVE ONE-YEAR TERMS ON EACH OF THE REMAINING FIVE
7 2ND. DEGREE ROBBERY COUNTS, INCLUDING SIX-MONTHS ON EACH OF
8 THE ATTEMPTED ROBBERY COUNTS / CHARGES (COUNTS 10 & 11).^{3.}

9 FINALLY, THE COURT IMPOSED A 1-YEAR
10 TERM FOR THE ARMYING ENHANCEMENT, FOR A TOTAL OF 12-YEARS^{3.}
11 ON THE FOLLOWING DAY, MARCH 20, 2003, THE COURT CORRECTED THE
12 SENTENCE ON COUNTS 10 & 11 TO 8-MONTHS IN EACH COUNT, FOR A
13 NEW TOTAL SENTENCE OF 12-YEARS, 4-MONTHS^{4.}

14 15 16 ARGUMENT

17 PETITIONER ACKNOWLEDGED, IN GUILTY PLEA,
18 THAT HE WAS SUBJECT TO A MAXIMUM PRISON TERM OF 12-YEARS, 4-
19 MONTHS^{5.} HOWEVER, THE COURT SHOULD NOT HAVE IMPOSED THE MAXIMUM
20 SENTENCE. BASED ON THE COUNTS OF CONVICTIONS, THE COURT SHOULD
21 HAVE SENTENCED PETITIONER TO A LESSER TERM. INSTEAD THE
22 JUDGE FOUND THAT THE FACTS WARRANTED IMPOSITION OF AGGRAVATED
23 TERMS^{6.} AND THUS IMPOSED THE UPPER TERM.^{6.}

24 THE "FACTS" FOUND BY THE JUDGE WERE NEITHER
25

-
- 26 3. CT. 160-161;
27 4. CT. 163;
5. CT. 134;
6. CT. 160-163.

1 ADMITTED BY PETITIONER NOR FOUND BY THE JURY. HENCE, SINCE
 2 THE ESSENTIAL FACTS INCREASE THE SENTENCE BY TWO-YEARS, FOUR-
 3 MONTHS, THE PENALTY IMPOSED VIOLATES PETITIONER'S CONSTITUTION-
 4 -AL FEDERAL RIGHTS.

5 UNDER THE REQUIREMENTS OF THE SIXTH AND FOUR-
 6 -TEENTH AMENDMENTS AS OUTLINED IN BLAKELY V. WASHINGTON,
 7 542 U.S. 296 (2004), AND AS RECENTLY REITERATED BY THE U.S.
 8 SUPREME COURT IN CUNNINGHAM V. CALIFORNIA (2007) 549 U.S.
 9 [127 S. CT. 856]. THE JUDGE COULD IMPOSE NO MORE THAN 10-YEARS,
 10 4-MONTHS (I.E., MIDTERM SENTENCE).

11 THE JUDGE IN THIS CASE STATED AT SENTENCING
 12 THAT SHE WAS RELYING ON THE AGGRAVATING FACTORS WHICH WERE
 13 CONTAINED IN THE PROBATION REPORT (CT. 161-163).

14 THESE FACTORS CONSIST OF ISSUES SUCH AS:

- 15 (1.) PETITIONER'S PRIOR ADJUDICAT-
 16 -IONS OF COMMISSION OF CRIMES AS A JUVENILE;
- 17 (2.) PETITIONER'S PRIOR PERFORM-
 -ANCE ON PROBATION WAS UNSATISFACTORY;
- 18 (3.) A VICTIM WAS HURT DURING
 19 ONE ROBBERY / PETITIONER ENGAGED IN A PATTERN OF VIOLENT
 CONDUCT WHICH INDICATES A SERIOUS DANGER TO SOCIETY; AND
- 20 (4.) PETITIONER'S CRIMES ARE OF
 21 INCREASING SERIOUSNESS AND HE IS A MEMBER OF A CRIMINAL
 STREET GANG.

22 PETITIONER SUBMITS THAT APPENDI-BLAKELY-
 23 CUNNINGHAM (SUPRA) RENDERS UNCONSTITUTIONAL PORTIONS OF
 24 CALIFORNIA'S DETERMINATE SENTENCING SCHEME, INCLUDING THE
 25 PROVISIONS OF (CAL.) P.C. § 1170(b) WHICH AUTHORIZES JUDGES, NOT
 26 JURIES TO MAKE FACTUAL FINDINGS SUPPORTING AGGRAVATING FACTORS
 27 USED TO IMPOSE THE UPPER TERM. THE SENTENCING JUDGE IN THIS

1 CASE IMPOSED THE UPPER TERM BASED UPON FACTUAL FINDINGS WHICH WERE
 2 NEITHER ADMITTED BY PETITIONER NOR FOUND TRUE BY A JURY. THE SENTENCING
 3 JUDGE ALSO WAS NOT REQUIRED UNDER THE CALIFORNIA RULES OF COURT,
 4 RULE 4.420 (6) TO APPLY THE PROOF BEYOND A REASONABLE DOUBT
 5 STANDARD TO ITS FACTUAL FINDINGS, AS REQUIRED IN BLARELY
 6 (AND FURTHER EXPLAINED IN CUNNINGHAM), BUT RATHER ONLY A
 7 PREPONDERANCE STANDARD; AND BECAUSE NONE OF THE SENTENCING
 8 FACTORS IN AGGRAVATION LISTED IN THE PROBATION REPORT OR USED
 9 BY THE TRIAL JUDGE IN IMPOSING THE SENTENCE WERE TRIED TO
 10 THE JURY OR PROVED BEYOND A REASONABLE DOUBT, THIS COURT
 11 SHOULD ORDER THAT THE COURT MAY NOT IMPOSE AN UPPER TERM ON
 12 EITHER COUNTS OR THE ENHANCEMENT ALLEGATIONS.

13 IN BLARELY THE UNITED STATES SUPREME COURT HELD
 14 THAT THE TRIAL COURT'S USE OF AGGRAVATING FACTORS VIOLATE THE
 15 RULE SET FORTH IN APPENDI V. NEW JERSEY, 530 U.S. 466 (2000),
 16 WHERE IT WAS HELD THAT (THE) DUE PROCESS (CLAUSE) REQUIRES THAT
 17 ANY FACT WHICH EXPOSES A DEFENDANT TO GREATER PUNISH-
 18 -MENT THAN THE MAXIMUM OTHERWISE ALLOWABLE ("STATUTORY
 19 MAXIMUM") FOR THE UNDERLYING OFFENSE HAD TO BE "SUBMITTED
 20 TO A JURY AND PROVED BEYOND A REASONABLE DOUBT" (Id.
 21 AT P. 490).

22 THE "STATUTORY MAXIMUM" FOR APPENDI
 23 PURPOSES IS THE MAXIMUM SENTENCE A JUDGE MAY IMPOSE SOLELY
 24 ON THE BASIS OF THE FACTS REFLECTED IN THE JURY VERDICT OR
 25 ADMITTED BY THE DEFENDANT.

26 * IN ALL MATERIAL RESPECTS, CALIFORNIA'S DETERMINATE
 27 SENTENCING LAW (D.S.L.) RESEMBLES THE SENTEN-
 -CING SYSTEMS INVALIDATED IN BLARELY AND BOOKER.
 FOLLOWING THE REASONING IN THOSE CASES, THE



MIDDLE TERM PRESCRIBED UNDER CALIFORNIA LAW,
NOT THE UPPER TERM, IS THE RELEVANT
STATUTORY MAXIMUM. BECAUSE THE AGGRAVAT-
-ING FACTS THAT AUTHORIZE THE UPPER TERM
ARE FOUND BY THE JUDGE, AND NEED ONLY BE
ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE,
(CALIFORNIA'S) D.S.L. VIOLATES THE RULE OF APPENDI."

(CUNNINGHAM V. CALIFORNIA (2007) 549 U.S.____, 127 S. CT. 856, AT 858)

WHEREFORE, UNDER APPENDI-BLAKELY -
CUNNINGHAM, THE ONLY FACTORS THE JUDGE IS PERMITTED TO USE TO
INCREASE A SENTENCE ARE THOSE PRESENTED TO THE JURY FOR ITS
CONSIDERATION AND FOUND TRUE BY IT BEYOND A REASONABLE DOUBT.
IF THE JURY DOES NOT FIND UNANIMOUSLY AND BEYOND A REASONABLE
DOUBT THAT THE AGGRAVATING FACTORS ARE TRUE, THE JUDGE MAY NOT
USE THEM TO INCREASE A SENTENCE (SEE, ALSO PEOPLE V. BANKS,
(APR. 13, 2007, 6036873) - CAL. APP. 4TH. - (2007 WL 1111849)).

IN THE INSTANT CASE, THE TRIAL COURT
WAS NOT REQUIRED TO IMPOSE A 12-YEAR, 4-MONTH SENTENCE.
HENCE, THE TRIAL COURT VIOLATED PETITIONER'S SIXTH AMENDMENT
RIGHT WHEN IT IMPOSED AN AGGRAVATED SENTENCE BASED
ON FACTS NOT FOUND BY A JURY TO BE TRUE BEYOND A
REASONABLE DOUBT OR STIPULATED BY PETITIONER.

PETITIONER WAS PREJUDICED BY THE ERROR.
USE OF FACTS NOT FOUND BY THE JURY BEYOND A REASONABLE
DOUBT NOR ADMITTED BY PETITIONER TO INCREASE A
DEFENDANT'S SENTENCE BEYOND THE STATUTORY MAXIMUM
REQUIRES REVERSAL OF THAT SENTENCE UNLESS THE STATE
CAN ESTABLISH THAT THE ERROR WAS HARMLESS BEYOND A
REASONABLE DOUBT (NEDER V. UNITED STATES (1999) 527

U.S. 1 ; PEOPLE V. SENGAPADYCHITH (2001) 26 CAL. 4TH. 316, AT 326)

THE ERROR IN THIS CASE WAS THEREFORE, AN ACTION TAKEN IN EXCESS OF THE TRIAL COURT'S AUTHORITY WHICH MAY BE CHALLENGED ON HABEAS CORPUS EVEN IF THERE HAS BEEN DELAY OR A PRIOR AFFIRMANCE ON DIRECT APPEAL.

"THE GENERAL RULE THAT AN UNEXPLAINED DELAY IN SEEKING RELIEF MAY BAR HABEAS CORPUS RELIEF DOES NOT APPLY TO BAR THE CORRECTION OF AN UNAUTHORIZED SENTENCE"; AND "AN UNAUTHORIZED SENTENCE MAY BE CORRECTED AT ANY TIME. THE STATE OF CALIFORNIA SHOULD HAVE NO INTEREST IN PERPETUATING A SENTENCE WHICH IS NOT AUTHORIZED BY LAW."

(IN RE BIRDAWELL (1996) 50 CAL. 4TH. 926, AT 927, & 931).

IN PEOPLE V. TENORIO (1970) 30 CAL. 3D. 89, AT 95 FN. 2, THE COURT HELD THAT "AN UNCONSTITUTIONAL SENTENCE IS FULLY RETROACTIVE RELATING ONLY TO SENTENCING AND WOULD NOT REQUIRE ANY RETRIALS". (SEE, ALSO, PEOPLE V. BELMONTES (1983) 34 CAL. 3D. 335, AT 348 FN. 8 (SAME); AND PEOPLE V. SUPERIOR COURT (RAMERO) (1996) 13 CAL. 4TH. 497, AT 530 FN. 13 (HOLDING THAT AN UNCONSTITUTIONAL SENTENCE MAY BE RAISED ON APPEAL, OR, IF RELIEF ON APPEAL IS NO LONGER AVAILABLE, THE DEFENDANT MAY FILE A PETITION FOR HABEAS CORPUS TO SECURE RECONSIDERATION OF THE SENTENCE.")).

"AS WE RECENTLY REAFFIRMED, THE RULE REQUIRING A HABEAS CORPUS PETITIONER TO JUSTIFY ANY SUBSTANTIAL DELAY IN RAISING A CLAIM, SUCH AS PETITIONERS, OF "SENTENCING ERROR AMOUNTING TO AN EXCESS OF JURISDICTION. AN APPELLATE COURT MAY 'CORRECT A SENTENCE THAT IS NOT AUTHORIZED BY LAW' WHENEVER THE ERROR COMES TO THE ATTENTION OF THE COURT (IN RE HARRIS (1993) 5 CAL. 4TH. 813, 842 CITING IN RE RICKY H. (1981) 30 CAL. 3D. 176, 191)."

(IN RE HODDINOTT (1996) 12 CAL. 4TH. 992, AT 995 FN. 2.)



II.

THE TRIAL COURT'S DENIAL OF PETITIONER'S WRIT OF HABEAS CORPUS HEREOFORTH WAS IN ERROR, AND APPROPRIATE REMEDY FOR TRIAL COURT'S APPENDI - BLAKELY - CUNNINGHAM SENTENCING ERROR IS TO REMAND PETITIONER'S CASE FOR RESENTENCING; APPENDI V. NEW JERSEY (2000) 530 U.S. 466; BLAKELY V. WASHINGTON (2004) 542 U.S. 296; U.S. V. OLAND (1993) 507 U.S. 725; AND PEOPLE V. BANKS (APR. 13, 2007, 6036873) CAL. APP. 4TH. (2007 WL1111849).

STATEMENT OF FACTS

ON APRIL 25, 2007 THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN, IN CASE NO. SC152826 A, DENIED PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (HEREOFORTH) BASED IN AN ERRONEOUS CONCLUSION THAT BECAUSE "PETITIONER EXECUTED A CHANGE OF PLEA FORM WHICH AMONG OTHER THINGS CONTAINED A WAIVER OF THE RIGHT TO A JURY TRIAL AS WELL AS AN AGREEMENT BY PETITIONER THAT HIS MAXIMUM SENTENCE EXPOSURE WAS IN FACT 12-YEARS AND 4-MONTHS. THE SENTENCE OF 12-YEARS WAS THEREFORE WITHIN THE PARAMETERS OF THE MAXIMUM SENTENCE TO WHICH PETITIONER AGREED" (PLEASE SEE COURT DENIAL ATTACHED HERETO AS EXHIBIT 'A').

CONCLUSION OF LAW

IN BOTH APPENDI AND BLAKELY, BOTH DEFENDANTS PLEAD GUILTY TO PLEA BARGAIN AGREEMENTS, HOWEVER, BECAUSE THE FACTS SUPPORTING THEIR AGGRAVATED (UPPER TERM) SENTENCES WERE NEITHER ADMITTED BY THEM NOR FOUND BY A JURY BEYOND A REASONABLE DOUBT TO BE TRUE, THE SENTENCES VIOLATED THEIR SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

FURTHERMORE, THE TRIAL COURT ALSO ALLEGES IN ITS

1 APRIL 25, 2007 DENIAL (ATTACHED HERETO AS EXHIBIT 'A') THAT
 2 HE FORFEITED (WAIVED) HIS RIGHT UNDER APPENDI - BLAKELY -
 3 CUNNINGHAM IS ALSO IN ERROR.

4 PETITIONER'S SENTENCE HEARING TOOK PLACE ON MARCH
 5 19, 2003, APPROXIMATELY 15-MONTHS PRIOR TO THE U.S. SUPREME
 6 COURT'S DECISION IN BLAKELY. WHEREFORE, THE TRIAL COURT'S
 7 IMPLICATION THAT PETITIONER KNOWINGLY WAIVED OR FORFEITED HIS
 8 BLAKELY CHALLENGE / ERROR, IS IMPOSSIBLE CONSIDERING THAT
 9 BLAKELY (AND CUNNINGHAM) WERE DECIDED AFTER PETITIONER
 10 WAS SENTENCED.

11 "WE FIND THERE IS NO WAIVER OR FORFEITURE
 12 OF BLAKELY ERROR IN THIS CASE BECAUSE
 13 A CRIMINAL DEFENDANT CAN NOT HAVE
 14 FORFEITED OR WAIVED A LEGAL ARGUMENT
 15 THAT WAS NOT RECOGNIZED AT THE TIME OF HIS
 16 TRIAL."

17 (PEOPLE V. ESQUIBEL (2006) 143 CAL. APP. 4TH 645, AT 660)

18 SEE, ALSO, U.S. V. OLAND, 507 U.S. 725, AT 733

19 ("WAIVER IS THE INTENTIONAL RELINQUISHMENT OR ABANDONMENT OF A
 20 KNOWN RIGHT.").

21 IT WAS NOT UNTILL BLAKELY THAT THE
 22 U.S. SUPREME COURT PROVIDED A CONSTITUTIONAL EXPLANATION OF
 23 WHAT IT HAD MEANT IN APPENDI BY THE PHRASE "STATUTORY
 24 MAXIMUM SENTENCE". THUS SO, BLAKELY MADE IT PERFECTLY
 25 CLEAR THAT, WHEN THE U.S. SUPREME COURT REFERRED TO THE
 26 "STATUTORY MAXIMUM SENTENCE" IN APPENDI, IT DID
 27 NOT MEAN THE MAXIMUM THE LEGISLATURE HAD AUTHORIZED, BUT
 RATHER THE MAXIMUM SENTENCE THAT CAN BE IMPOSED, BASED
 SOLELY ON THE JURY'S FINDINGS OR ADMITTED BY THE DEFENDANT

1 (BLAKELY, SUPRA, 542 U.S. AT 296).

2 APPLYING THIS DEFINITION, A HIGH-END
3 SENTENCE, SUCH AS PETITIONERS', BASED ON FACTS FOUND BY THE
4 JUDGE ALONE DOES EXCEED THE "STATUTORY MAXIMUM",
5 BECAUSE THE MID-TERM SENTENCE IS THE MOST THAT CAN BE
6 IMPOSED WITHOUT SPECIAL FINDINGS.

7
8 CONCLUSION

9 FOR THE FOREGOING REASONS HEREIN, THIS
10 COURT SHOULD REMAND THIS CASE TO THE TRIAL COURT FOR RESENTENCING
11 OF PETITIONERS' SENTENCE TO THE MIDDLE TERMS PURSUANT
12 TO THE MANDATES OF THE UNITED STATES SUPREME COURT DECISIONS
13 DECISIONS OF APPENDI-BLAKELY-CUNNINGHAM AND CONSISTENT
14 WITH THIS COURT'S RULING IN PEOPLE V. BANKS (APR. 13, 2007;
15 6036873) — CAL. APP. 4TH. — (2007 WL 1111849).

16
17 DATED MARCH 25, 2008

RESPECTFULLY SUBMITTED BY:

18 ALEJANDRO F. MICHEL
19 ALEJANDRO F. MICHEL
20 —PRO-PER PETITIONER.
21
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Exhibit



FILED

APR 25 2007

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: [Signature] Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

In re ALEJANDRO FRANCISCO MICHEL)

Petitioner,)

Case No. SC 152826A

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

Petitioner filed his Petition for Writ of Habeas Corpus on April 4, 2007. Following a plea of guilty to five counts of violating Penal Code §211 and two counts of attempted §211, Petitioner was sentenced on March 19, 2003 in the Superior Court in Marin County to the aggravated term of twelve years in the state prison.

Petitioner now complains pursuant to what is known as a *Blakely/Apprendi/Cunningham* argument that he was improperly sentenced to the aggravated term because factors in aggravation were not found to be true by a jury.

Petitioner appealed his sentence and the sentence was affirmed by the Court of Appeal on April 28, 2004. In reviewing the record, it appears that Petitioner executed a change of plea form which among other things contained a waiver of the right to a jury trial as well as an agreement by Petitioner that his maximum exposure was in fact twelve years and four months. The sentence of twelve years was therefore within the parameters of the maximum sentence to which Petitioner agreed.

The Petition for Writ of Habeas Corpus is therefore denied.

Dated: April 25, 2007

[Signature]
JUDGE OF THE SUPERIOR COURT

STATE OF CALIFORNIA)
COUNTY OF MARIN)

IN RE: **ALEJANDRO FRANCISCO MICHEL**

ACTION NO.: **SC152826A**

(PROOF OF SERVICE BY MAIL – 1013A, 2015.5 C.C.P.)

I AM AN EMPLOYEE OF THE SUPERIOR COURT OF MARIN; I AM OVER THE AGE OF EIGHTEEN YEARS AND NOT A PARTY TO THE WITHIN ABOVE-ENTITLED ACTION; MY BUSINESS ADDRESS IS CIVIC CENTER, HALL OF JUSTICE, SAN RAFAEL, CA 94903. ON **April 25, 2007** I SERVED THE WITHIN ***ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS*** IN SAID ACTION TO ALL INTERESTED PARTIES, BY PLACING A TRUE COPY THEREOF ENCLOSED IN A SEALED ENVELOPE WITH POSTAGE THEREON FULLY PREPAID, IN THE UNITED STATES POST OFFICE MAIL BOX AT SAN RAFAEL, CA ADDRESSED AS FOLLOWS:

ALEJANDRO FRANCISCO MICHEL CDC# T-86169 CALIFORNIA CORRECTIONAL INSTITUTION PO BOX 1906/48-8C-204 TEHACHAPI, CA 93581	WARDEN CALIFORNIA CORRECTIONAL INSTITUTION PO BOX 1906 TEHACHAPI, CA 93581
ATTORNEY GENERAL ATTN: ANYA BINSACCA CORRECTIONAL LAW SECTION 455 GOLDEN GATE AVENUE 12TH FLOOR SAN FRANCISCO, CA 94102	

I CERTIFY (OR DECLARE), UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

DATE:

4/25/07 *MMurphy*

Exhibit

B

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

In re ALEJANDRO FRANCISCO MICHEL on Habeas
Corpus.

FILED

JUL 13 2007

A118214

Marin County No. 123016

COURT OF APPEAL OF THE STATE OF CALIFORNIA
DIANA HERBER

By

DEPUTY

BY THE COURT:*

The petition for writ of habeas corpus is denied.

JUL 13 2007

Date

JONES, P.J. P.J.

* Before Jones, P.J., Simons, J. and Needham, J.

EXhibit "C"

S155473

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ALEJANDRO F. MICHEL on Habeas Corpus

The petition for writ of habeas corpus is denied.

George, C. J., was absent and did not participate.

SUPREME COURT
FILED

JAN 30 2008

Frederick K. Ohlrich Clerk

Deputy

BAXTER

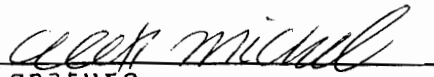
Acting Chief Justice

CERTIFICATE OF SERVICE

Case Name: Alejandro F Michel v. J. Walker, Warden
Case No.: S155473

IMPORTANT: 2 copies of this brief and any attachments must be sent to ALL parties in this case. Please list below the names and addresses of the parties who were sent a copy of your brief and the dates on which they were served. Be sure to sign the statement below.

I certify that a copy of this brief and any attachments was served, either in person or by mail, on the persons listed below.


Signature
Notary NOT required

Name

Address

Date Served

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

450 GOLDEN GATE AVENUE
P.O. BOX 36060,
SAN FRANCISCO, CA 94102

MARCH 25, 2008